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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMES ANTHONY GOTTFRIED,

Defendant and Appellant.

2d Crim. No. B175678
(Super. Ct. No. 347581)
(San Luis Obispo County)

James Anthony Gottfried appeals his conviction, by jury, of unlawful driving or taking of a vehicle (Veh. Code, § 10851, subd. (a)), and possession of or receiving stolen property. (Pen. Code, § 496, subd. (a).¹) The trial court sentenced appellant as a second strike offender to a total term in state prison of eight years, four months. This included an upper-term sentence three years for taking the vehicle, a consecutive eight-month term on the receiving count, each doubled pursuant to the Three Strikes Law, and a one-year term for appellant's prior prison term. (§ 667, subd. (d)-(e); § 667.5, subd. (b).) Appellant contends the trial court erred because it did not instruct the jury to view his admissions with caution and because it imposed upper term and consecutive sentences based on findings not made by the jury. Appellant further

¹ All statutory references are to the Penal Code unless otherwise stated.

contends he is entitled to two additional days of presentence conduct credit. We conclude any errors were harmless and order the abstract of judgment corrected to reflect a total of 354 days of presentence custody credit. As so modified, the judgment is affirmed.

Facts

At 3:00 a.m. on Sunday, September 21, 2003, Christopher Wesney parked his pickup truck in his driveway. He left the truck unlocked with the keys inside because he lives in a gated community outside Atascadero and thought the truck would be safe. At 9:00 that morning, Wesney discovered it had been stolen. Also missing was a satellite radio receiver belonging to Wesney's mother and personal property Wesney left in his truck.

At 6:47 p.m. that same evening, an Atascadero police officer saw Wesney's truck parked on the side of San Gabriel Road. When he pulled over to check the truck's license plate, appellant emerged from the driver's side of the cab and ran away through a forested area. He was arrested about 30 minutes later, hiding in a nearby barn. Appellant seemed intoxicated. Credit and ATM cards taken from two other Atascadero residents were found in his pockets. In the cab of Wesney's pickup truck, officers found most of the personal property Wesney had reported stolen, including his mother's satellite radio receiver. They also found property that did not belong to Wesney. Several of the items had been reported stolen by the owner of one of the credit cards found in appellant's pocket. There was beer and melting ice on the passenger seat. The rear of the truck was dented, its front suspension had been damaged, there were burn marks on the seats and stains on the carpet and the stereo was broken. The truck was completely out of gas.

Appellant testified that he was addicted to methamphetamine at the time of his arrest. He spent that weekend with his friend Brian Stewart. They worked during the day and took drugs and drank at night. At about 4:30 on Sunday afternoon, appellant got a call on his cell phone from another friend, Shawn Maloney. Maloney needed help because his truck was broken down on San Gabriel Road. Appellant drove his own car out to help Maloney. The car broke down before he found Maloney, however, and he

had to leave it in a church parking lot. Appellant walked from the church to Maloney's disabled truck. The two men tried to fix the truck but couldn't. Maloney decided to walk to a nearby school to use the pay phone to call for help. He gave appellant permission to sit in the cab to change out of his dirty work clothes. After appellant had been in the truck for about five minutes, he noticed a gun case behind one of the seats. Because he was on parole at the time, appellant did not want to be around a gun. He was getting out of the truck just as the police officer drove up. Appellant ran away because he was afraid he had violated his parole by drinking and being around a gun. He denied stealing the truck or any of the personal property.

A police officer present at appellant's arrest testified that appellant told the officer he got the truck from Shawn Maloney in Templeton. Appellant did not mention that Maloney was nearby making a telephone call nor did he explain that he had only been changing his clothes in the truck cab. Brian Stewart testified that appellant stayed with him the weekend Wesley's truck was stolen. Stewart lives about 400 yards from the gated neighborhood in which Wesley parked his truck.

Discussion

CALJIC No. 2.71

Appellant contends the trial court erred because it did not instruct the jury with CALJIC No. 2.71, i.e., that the jury is to view with caution the admissions he made to the police officer. He contends the error was prejudicial because his statements were the only substantial evidence that he drove the truck, an essential element of the offense. (Veh. Code, § 10851; *People v. Green* (1995) 34 Cal.App.4th 165, 180.)

We agree that the trial court erred when it failed to instruct the jury to view appellant's admissions with caution. (*People v. Bunyard* (1988) 45 Cal.3d 1189, 1224.) The error was, however, harmless because it is not "reasonably probable that a result more favorable" to appellant would have been reached in its absence. (*Id.*)

There was other substantial evidence from which the jury reasonably could infer that appellant drove the truck. Somehow, the truck got from Wesley's driveway to San Gabriel Road with both appellant and the stolen personal property inside it. Wesley

parked the truck only a short distance from the house where appellant spent the weekend. Appellant ran away and hid when police approached the truck. He was carrying stolen credit cards at the time of his arrest. Appellant did not tell the police that he had only been changing clothes inside the truck and he did not mention that Maloney had gone to call for help. He produced no evidence at trial to support his version of the events. All of these facts support a reasonable inference that appellant drove the truck from Wesney's driveway to San Gabriel Road, even without reference to his post-arrest admissions. Under these circumstances, there is no reasonable probability that appellant would have obtained a more favorable verdict had the trial court instructed the jury in terms of CALJIC 2.71. The error was harmless.

Sentencing Issues

The trial court imposed the upper term of three years on count 1, for unlawful driving or taking of a vehicle (Veh. Code, § 10851, subd. (a)), and a consecutive term of eight months on count 2, for receiving stolen property. In doing so, it cited the following factors in aggravation: "[California Rules of Court rule] 4.421(B)(2), the defendant's prior convictions as an adult or sustained petitions in juvenile delinquency proceedings are numerous or of increasing seriousness; 4.421(B)(3), the defendant has served a prior prison term; 4.421(B)(4), the defendant was on probation or parole when the crime was committed; 4.421(B)(5) the defendant's prior performance on probation or parole was unsatisfactory. And as previously stated, the court is considering the fact that the defendant has admitted that he perjured himself during his jury trial." The court found no factors in mitigation.

Appellant contends the trial court committed error under *Blakely v. Washington* (2004) 542 U.S. ____ [124 S.Ct. 2348, 147 L.Ed.2d 435] and *Apprendi v. New Jersey* (2000) 530 U.S. 466, because it imposed the upper term and consecutive sentences based on facts not found by the jury. *Blakely* and *Apprendi* do not require a jury trial to determine the fact of a prior conviction. (*Blakely v. Washington, supra*, 124 S.Ct. at p. 2536.) Here, four of the five factors cited by the trial court in aggravation were related to appellant's prior convictions. Only a single circumstance in aggravation supports

imposition of an upper term of imprisonment. (*People v. Osband* (1996) 13 Cal.4th 622, 730; *People v. Cruz* (1995) 38 Cal.App.4th 427, 433-434.) The consecutive terms were also based on appellant's prior strike conviction. (§ 667, subd. (c)(6).) Under these circumstances, there was no *Blakely* error and any such error would have been harmless beyond a reasonable doubt. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 320.)

Presentence Credit

Appellant contends he is entitled to two additional days of presentence conduct credit. Respondent correctly concedes the point. Appellant is entitled to 118 days of presentence conduct credit, rather than the 116 days credited to him by the trial court. The abstract of judgment must be modified to reflect the correct number of days' credit.

Conclusion

The clerk of the superior court is ordered to prepare and forward to the Department of Corrections a corrected abstract of judgment reflecting 118 days of presentence conduct credit, for a total of 354 days of presentence custody credit. As so modified, the judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

John A.Trice, Judge
Superior Court County of San Luis Obispo

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